INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	3
Conclusion	4
Appendix	5

CITATIONS

Cases:	
Brunswick-Balke-Collender Co. v. *Harrison*, 116 F. (2d) 786	3
Chicago Flag & Decorating Co. v. *United States*, decided March 10, 1941	3
Statute:	
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 609	5
Miscellaneous:	
T. D. 4853, 1938–2 Cum. Bull. 383	5
Treasury Regulations 46:	
Art. 53	5
Art. 54	6

302874—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 807

EDWARD J. DARBY & SON, INC., PETITIONER

v.

WALTER J. ROTHENSIES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 30–33) is not reported. The opinion of the Circuit Court of Appeals (R. 36–37) is reported in 116 F. (2d) 268.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed December 3, 1940. (R. 37.) The petition for a writ of certiorari was filed on March 3, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether hole cups, flag poles and markers, designed for use on golf links, are subject to the excise tax imposed by Section 609 of the Revenue Act of 1932 on "games and parts of games" and on "all similar articles commonly or commercially known as sporting goods."

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are printed in the Appendix.

STATEMENT

Section 609 of the Revenue Act of 1932 (set out in the Appendix) levies a tax on numerous specific articles used in games or sports, on "games and parts of games," and on "all similar articles commonly or commercially known as sporting goods."

Petitioner manufactures and sells equipment for use in the game of golf. Respondent assessed a tax against it under Section 609 of the Revenue Act of 1932 with respect to flag poles, hole cups and markers used for golf courses. (R. 26, 32.) Petitioner paid the tax involved and then sought a refund, which was denied. (R. 26–27, 30.)

Petitioner thereupon sued in the District Court for recovery of the taxes paid, and obtained a judgment for the full amount. (R. 33.) The Circuit Court of Appeals for the Third Circuit reversed the decision of the District Court and entered a judgment for the respondent. (R. 37–38.)

ARGUMENT

1. Petitioner cites *Brunswick-Balke-Collender Co.* v. *Harrison,* 116 F. (2d) 786 (C. C. A. 7th), as in conflict with the decision below. In that case it was held that Section 609 is not applicable to bowling alleys. But, as stated in the opinion in the *Brunswick-Balke-Collender* case, the two decisions are entirely consistent: the instrumentalities with which a game is played are different from the courts, floors, alleys and so forth on which such games are played, and in the *Brunswick-Balke-Collender* case the undisputed evidence showed that bowling alleys are never sold by sporting goods stores while in the present case the undisputed evidence shows that all sporting goods concerns list the equipment involved herein as part of their stock in trade. (R. 19.) Furthermore, in *Chicago Flag & Decorating Co.* v. *United States,* decided on March 10, 1941, the Circuit Court of Appeals for the Seventh Circuit held that flags, made for use as golf flags, are within the purview of Section 609. The court stated that its holding was readily distinguishable from its decision in the *Brunswick-Balke-Collender* case, and cited the decision of the court below in the instant case as being squarely in point.

2. Petitioner's only other contention, that the court below has extended the terms of the Act beyond its fair intent and meaning, is but an assertion that the decision below is erroneous, and shows no ground for certiorari.

CONCLUSION

The decision below presents neither a conflict nor a question of general importance, and the petition should therefore be denied.

Respectfully submitted.

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MARCH 1941.